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SUPREME COURT, U.S.

No. 98-289

In The

Supreme Court of the United States

October Term, 1997

KATHERINE M. HENDON, Administrator of the Estate of Martha Mayberry, Deceased,

Petitioner,

v.

E.I. DU PONT DE NEMOURS AND COMPANY and JAKE FULLER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent E.I. du Pont de Nemours and Company ("DuPont") has no parent company. There are presently seven publicly held entities in which DuPont, or a subsidiary or affiliated company of DuPont, owns an interest. DuPont Canada, Inc. and DuPont Photomasks, Inc. are subsidiary companies. DNAP Holding Corporation; Hudson Technologies, Inc.; Pioneer Hi-Bred International, Inc.; Shaman Pharmaceuticals, Inc.; Trigon Healthcare, Inc. are companies in which DuPont holds an indirect minority, non-controlling interest.

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STATEMENT OF THE CASE

Martha Mayberry, a DuPont employee, was covered by three ERISA-governed employee benefit plans: (1) a DuPont Group Life Insurance plan; (2) a DuPont Savings Plan; and (3) a TRASOP Stock Plan. [App. 2a-3a]. With respect to each of these plans, DuPont required Ms. Mayberry to designate a beneficiary to receive benefits from the plan in the case of her death. She retained the right to change her beneficiary at any time prior to her death. Ms. Mayberry designated her husband, Jake Fuller.

On June 6, 1994, Ms. Mayberry and Mr. Fuller entered into a marital dissolution agreement which, in relevant part, specifically awarded Ms. Mayberry all of her DuPont pension and retirement benefits, as well as her DuPont Stock and Thrift Plan and SIP Plan. [App. 12a-13a]. In addition to this, the agreement divested Mr. Fuller of all rights, title and interest in Ms. Mayberry's property. [App. 13a]. Yet, as for the plan documents themselves, Ms. Mayberry failed to remove Mr. Fuller as beneficiary, nor did she designate an alternate payee.

Ms. Mayberry died intestate on July 17, 1994, and Petitioner was appointed administrator of the estate. [App. 20a]. After Ms. Mayberry's death, DuPont paid the benefits under these plans to Ms. Mayberry's named beneficiary, Jake Fuller. [App. 20a]. Petitioner alleged that DuPont, notwithstanding the provisions of the divorce decree and marital dissolution agreement, improperly distributed the benefits to Fuller, despite its awareness of Ms. Mayberry's divorce from Fuller and Petitioner's objections. As a result, Petitioner filed state law claims of

breach of contract and conversion against DuPont in the Chancery Court of Hamilton County, Tennessee.

After removing this action to the United States District Court for the Eastern District of Tennessee, DuPont requested the district court dismiss Petitioner's claims with prejudice because (1) the estate's claims are preempted by ERISA; (2) Ms. Mayberry did not change her beneficiary, the divorce agreement at issue did not change Jake Fuller's beneficiary status, and DuPont was thus required to pay the disputed proceeds to the named beneficiary; and (3) Petitioner had failed to exhaust the administrative remedies available to her as required by ERISA. [App. 20a-21a]. Petitioner asserted in her response simply that her state law claims are not preempted by ERISA, and that the language of the marital dissolution agreement constituted a specific waiver of defendant Fuller's interest in the plans.

The district court granted DuPont's motion to dismiss on August 13, 1996. [App. 26a]. It held that Petitioner's cause of action was governed and preempted by ERISA [App. 23a] and that the marriage dissolution agreement did not change Jake Fuller's beneficiary status under the employee benefits plans. [App. 24a]. Petitioner appealed to the United States Court of Appeals for the Sixth Circuit.

On April 13, 1998, the Sixth Circuit affirmed the judgment of the district court, holding that ERISA preempted Petitioner's claims and that the plan documents required by ERISA controlled the designation of

beneficiaries. [App. 40a]. Petitioner has now filed the instant Petition for Writ of Certiorari.

REASONS WHY PETITION SHOULD BE DENIED

I. Petitioner's principal argument is that there is a split of authority among the circuits as to whether the language of ERISA or federal common law applies in resolving whether a divorce decree or the benefit plan documents should govern the disposition of benefits after the death of an employee. In the instant case, the Sixth Circuit, consistent with its prior decisions, found that the unaltered plan documents governed as directed by the provisions of ERISA that require the plan administrator, DuPont, to discharge its duties "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). Petitioner attempts to construct its argument of a conflict of authority among the circuits by citation to several other opinions. However, an examination of those cases reveals less than a square conflict of significant proportions to warrant this Court's intervention.

First, it is worthy of note that the instant decision does not expand any difference of approach to this question by the courts of appeals. The Sixth Circuit has been consistent in its position, as Petitioner correctly recognizes. (Pet. 4). The instant unpublished, *per curiam* opinion does not represent any change in the alleged balance of opinions among the circuits that would warrant resolution by this Court.

Second, Petitioner's sweeping assertion of a conflict of opinions does not withstand studied analysis. A deep, abiding division is not as yet clear. For example, unlike the case at bar, several of the opinions cited by Petitioner are factually limited to the distribution of life insurance proceeds. *Mohamed v. Kerr*, 53 F.3d 911, 912 (8th Cir. 1995), *cert. denied*, 516 U.S. 868 (1995); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1322 (5th Cir. 1994), *cert. denied*, 513 U.S. 1081 (1995); *Metropolitan Life Ins. Co. v. Hanslip*, 939 F.2d 904, 905 (10th Cir. 1991).[1]

Particularly weak is Petitioner's reliance on the Tenth Circuit's decision in *Hanslip* where there was never a mention of life insurance during the divorce proceedings. In fact, citing the Sixth Circuit's decision in *McMillan v. Parrott*, 913 F.2d 310, 312 (6th Cir. 1990), the *Hanslip* court actually enforced the use of the designation of beneficiary in the insurance policy. *Hanslip*, 939 F.2d at 907.

Likewise, the Eighth Circuit's decision in *Mohamed* does not materially advance a strong argument that a conflict exists in need of immediate resolution. In addition to being an insurance controversy, *Mohamed* does not even discuss the duty of the plan administrator under 29 U.S.C. § 1104(a)(1)(D). The parties in that case neither alleged a cause of action under ERISA nor claimed that a particular ERISA section expressly governed the issue. *Mohamed*, 53 F.3d at 913. *Mohamed* does not analyze the

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[1] Even if common law had been applied, the result would likely be no different. Looking to analogous state law for guidance, the Tennessee Supreme Court has upheld beneficiary designation over a divorce decree. *Bowers v. Bowers*, 637 S.W.2d 456 (Tenn. 1982).

applicability of ERISA's anti-alienation provisions which provides that pension plans "shall provide that benefits under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1).

In the final analysis, the instant petition highlights different approaches taken by some of the courts of appeals on the narrow question of the setting of a standard for recognition of beneficiaries to ERISA benefit plans. In light of the very technical and complex nature of this area of law and the need for further analysis of the language of ERISA bearing on this question, we suggest that the Court defer consideration of the question until more of the lower courts have more fully and directly considered the issue.

II. Petitioner cannot set forth any serious split of opinion among the lower courts on whether state causes of action that in effect question the naming of beneficiaries to benefit plans are preempted by ERISA. (Pet. 6). Indeed, the Fifth Circuit, in a case relied upon by Petitioner, found no viable view among the courts contrary to preemption. *Brandon*, 18 F.3d at 1325.

Nevertheless, in a rather desperate attempt to have this Court review this case, Petitioner now argues that the Sixth Circuit failed to follow its own precedent by not granting rehearing on whether the divorce decree was a qualified domestic relations order ("QDRO") under ERISA, 29 U.S.C. § 1056(d)(3). (Pet. 8). The decree in question here did not satisfy the statutory requirements.

In any event, as Petitioner readily admits in her Petition (Pet. 3, 8), this issue was not directly raised or litigated below until she raised the matter before the Sixth Circuit on her petition for rehearing. The Sixth Circuit quite properly discounted such a late theory, and this Court should ignore it as a basis for further review.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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